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No. 94-1482

In the Supreme Court
of the United States

OCTOBER TERM, 1994

LEROY CLOUSER, et al.,
Petitioners,
v.
DAN GLICKMAN,
SECRETARY OF AGRICULTURE,
UNITED STATES OF AMERICA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTION

Pursuant to this Court's Rule 15.7, Petitioners respectfully file this supplemental brief to inform the Court of significant proposed R.S. 2477 public highway regulations of the Department of the

Interior. Supp. Br. App-B. These proposed regulations provide substantive and procedural requirements for implementing the Ninth Circuit's R.S. 2477 public highway rights-of-way ruling in this case. Pet. App.-A 65-67.[1] Substantial constitutional and statutory conflicts exist between the Ninth Circuit's ruling and important and pivotal state interests in "[t]housands of miles of highways [which] have been constructed across the public domain." Supp. Br. App.-B 2.[2]

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[1]The Ninth Circuit held that the Forest Service has authority to regulate use of R.S. 2477 public highways. Pet. App-A 67. More importantly, however, the Court of Appeals left standing the District Court's holding that "the Forest Service may properly rule on such issues [as whether or not trails and roads qualify as public highways under R.S. 2477] in the course of carrying out its duty to review and approve plans of operations." Pet. App-A65-66.

[2]The R.S. 2477 statute operates to vest states with in-place jurisdiction over public highway rights-of-way appropriated and granted under the Act. Thereafter,

II. PROPOSED R.S. 2477 REGULATIONS EXTEND THE NINTH CIRCUIT'S RULING, PREEMPTING STATE'S JURISDICTION OVER PUBLIC RIGHTS-OF-WAY

The Ninth Circuit further approved abbreviated Forest Service fact gathering and decisionmaking processes used to determine Petitioners' motorized access rights; these summary procedures were held to be adequate in meeting Fifth Amendment due process standards for protection of petitioners' mining claim property rights. Pet. Ap.-A75-80.

On August 1, 1994, before the Ninth Circuit issued its decision in this case on

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rights-of-way grants are governed by state laws enacted under state police and other powers. Both the Ninth and Tenth Circuits have recognized state jurisdiction to make initial determinations on the establishment of R.S. 2477 rights-of-way. Sierra Club v. Hodel, 848 F2d 1068, 1080, 1083-85 (10th Cir. 1988); Shultz v. Department of Army, U.S., 10 F3d 649, 655 (9th Cir, 1993). Now, however, the Ninth Circuit's holding in this case has completely federalized R.S. 2477 public highway access determinations.

December 7, 1994, the Interior Department published proposed R.S. 2477 public highway regulations. 43 CFR Part 39, 59 Federal Register 39216-39229. Supp. Br. App B. These proposed regulations adopt administrative procedures which contain the identical constitutional and statutory flaws as the Forest Service procedures upheld by the Ninth Circuit's R.S. 2477 ruling in this case. Coincidentally with the filing of this Petition, the period for submission of comments on the proposed regulations has been extended to August 1, 1995. 60 Federal Register 4135 (Jan. 20, 1995).

Key provisions of the proposed R.S. 2477 regulations radically extend the Court of Appeals holding in this case, in effect preempting all state jurisdiction to determine the existence, use and termination of all R.S. 2477 rights-of-ways. See, proposed 43 CFR §§ 39.2 and 39.8. Suppl. Br.

App.-B 7, 11-13.

These proposed regulations provide for abbreviated administrative appeal processes. These processes omit an oral, evidentiary hearing before a neutral trier of fact. For example, proposed 43 CFR § 39.6, Supp. Br. App.-B 10 specifies substantive and procedural requirements for making and determining claims without hearing. Proposed 43 CFR § 39.9, Supp. Br. App.-B 13, 14, fails to mandate a de novo hearing before a neutral factfinder if the claimant excepts to the authorized officer's decision, Marshall v. Jerrico, Inc., 446 US 238, 245, 247-48 (1980).

In addition, proposed 43 CFR § 39.4, Supp. Br. App.-B 9, recognizes and gives effect to federal district court R.S. 2477 determinations without giving similar effect to final state court decisions on R.S. 2477 claims not disputed in the

federal district courts.

Finally, proposed 43 CFR § 39.7, Supp. Br. App.-B 10-11, operates by regulatory authority to forfeit R.S. 2477 claims to public highway rights-of-way unless the claims are timely filed within the time specified by the regulations.

Congress, in a situation analogous to R.S. 2477, has established authority for federal agencies to grant and transfer to states federal highway rights-of-way with procedures for states to return lands to United States jurisdiction when the lands are no longer needed. 23 U.S.C. § 317. Supp. Br. App.-A. Similarly, the R.S. 2477 statute specifies no term for the grants, no provisions for termination of rights-of-way except as provided under state laws, and no provision for the return of the rights-of-way to United States jurisdiction. Pet. App-D 13.

This Court's review of the Court of Appeals R.S. 2477 holding will ensure that the requirement for Congressional action for forfeiture and revestment of in-place public land grants will not be eroded.[3]

Of particular significance under the decisions of this Court are constitutional, statutory and regulatory requirements for (1) prerequisite judicial determinations and Congressional statutory authority for reversion and administration of reverted

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[3]A further illustration of the erosion which has been occurring is the conflict over public land ownership and jurisdiction in the state of Nevada. The government recently filed an action in the Nevada District Court seeking to resolve conflict between county claims over public lands and roads situated upon national forest lands which implicate R.S. 2477 grants. See, United States of America v. Nye County, Nevada, U.S. Dist. Ct., Dist. of Nevada, Case No. CV-S-95-00232-LDG (RJJ), filed March 8, 1995. This Nevada case involves strong reaction to Forest Service actions, and makes review of the Ninth Circuit's R.S. 2477 ruling more meaningful and timely.

rights-of-way involving federal lands, Oregon and California Railroad Company v. United States, 238 US 393, 438-39 (1915); (2) adequate notice and forfeiture provisions and implementing regulations for forfeiture of R.S. 2477 public highway claims such as have been found constitutional by this Court for the registration and forfeiture of unpatented mining claims, Locke v. United States, 471 US 84 (1985); (3) hearings and appeals processes affording states and individuals opportunity to assert and defend their rights and interests under Fifth Amendment due process standards. Pet. 53-59.

Accordingly, the proposed regulations supplanting state court jurisdiction over R.S. 2477 public rights-of-way represent a radical departure from due process standards traditionally employed by the states and this Court. The proposed

regulations also represent a significant diminishment of state control over highways, an event which has been sanctioned by the Court of Appeals' holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Philip F. Schuster, II
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Counsel for Petitioners.

Dated: June 5, 1995.

Title 23, U.S.C. - Highways Section 317

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§ 317 Appropriation for highway purposes of lands or interests in lands owned by the United States

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(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the state highway department, or its nominee, for such purposes and subject to the conditions so specified.

(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the state highway department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

(d) The provisions of this section shall apply only to projects constructed on a Federal-aid system or under the provisions of chapter 2 of this title.

Federal Register Vol. 59. No. 146
Pages 39216 to 39229
Monday, August 1, 1994
Department of the Interior
Office of the Secretary
43 CFR Part 39

Revised Statute 2477 Rights-of-Way
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ACTION: Proposed rule.
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Background
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Although this more than a century-and-a-quarter-old provision was repealed nearly 18 years ago, interpreting it today remains important, because valid rights-of-way existing at repeal were not terminated. In recent years there has been growing controversy, concentrated in two Western States, over whether specific claimed access route sought to be considered "highways" that were "constructed" pursuant to R.S. 2477, and if so, the extent of rights thus obtained.

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On June 1, 1993, the Secretary of the Interior submitted to the Congress the "United States Department of the Interior Report to Congress on R.S. 2477; The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands (Report)". In the "Report" the Secretary informed Congress that the Department of the Interior (DOI) would promulgate regulations to address these ongoing concerns.

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Need for the Regulations

Thousands of miles of highways have been constructed across the public domain, including many existing State and county highways in the Western United States, under the authorization of R.S. 2477 and similar provisions. Rights-of-way validly acquired pursuant to R.S. 2477 are historic and important means of access to and across

Federal lands for local citizens, recreationists, and Federal land managers performing official duties.

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These proposed regulations are intended to clarify the provision in its historic context and to provide a formal administrative process -- as an alternative to potentially expensive and lengthy judicial proceedings - by which validly acquired rights-of-way will be recognized and regulated.

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The ability of Federal agencies to meet their statutory obligations is compromised if claims are not identified with finality. For example, land use planning to provide for orderly and responsible decisionmaking on Federal lands is adversely affected if previously unnoticed or unused R.S. 2477 rights-of-way

can be claimed for an indefinite period. Federal land managing agencies are required by existing laws to prepare long-term land use planning documents that identify and analyze the condition of the land, current and future uses, current and future environmental protection measures, and other measures to establish an appropriate management scheme. Preparation of these land use plans, whether they are General Management Plans prepared for each unit of the National Park Service or Resource Management Plans prepared for BLM lands, is a lengthy, complex process designed to meet existing legal requirements, the needs of the public, and the resource.

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Role of State and Federal Law

The relationship between State and Federal law is important both for determining whether a right-of-way was validly

acquired and for determining the scope of a right-of-way. The proposed rule states that Federal law controls interpretation of the offer made by R.S. 2477, but that claimants are required also to comply with State law, which therefore may further condition the acceptance of a right-of-way or define its scope. A claimant cannot, however, accept under State law something that was not offered by Federal law. The interplay between State and Federal law has created some confusion, which this proposed rule is intended to eliminate. The rule would continue to recognize the role of State law, to the extent that State law is consistent with the baseline requirements of Federal law. The Department is authorized to recognize only those interests in the Federal lands that have been established in accordance with the directions of Congress. It cannot

recognize highways purported to be established under state laws that do not meet minimal Federal statutory requirements, written into R.S. 2477, for construction of a highway over unreserved public land.

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While this proposed rule was in preparation, a panel of the Ninth Circuit Court of Appeals issued a decision in the case of Schultz v. Department of the Army, 92-35197, 92-35580, 1993 U.S. App. Lexis, 31037. (9th Cir., Nov. 30, 1993). The panel decision took a somewhat more lenient view of the criteria for establishing a valid R.S. 2477 right-of-way than does this proposed rule. The Federal Government believes the panel decision is not consistent with congressional intent or practice under the statute, and the United

States is seeking a rehearing of the panel's decision before the full Ninth Circuit Court of Appeals. The Department will, of course, take any final decision in the case into account in moving forward with a final rule.

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Section by Section Analysis

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Section 39.2 Authority

This section would provide citations to the general authorities to the Secretary of the Interior, and to the specific authorities of the National Park Service, Bureau of Land Management, and U.S. Fish and Wildlife Service to manage the Federal lands.

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Section 39.3 Definitions

This section would define the statutory terms in these regulations.

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Paragraph (d) Claimant: The term claimant would be defined as any person or entity asserting the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior under these regulations or in any court action. The Department presumes that all claimants will be State or local government agencies with authority for public highway management. However, there may be rare cases in which a private citizen constructed and operates a highway (that meets all other requirements) in such a manner as to have validly acquired a right-of-way pursuant to R.S. 2477. The Department will consider such claims, unless they are precluded by State law, but will require that these same standards be met.

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Section 39.4 Recognition of a Validly Acquired Grant

This section would provide that the Department will recognize Federal court decisions, and decisions of the authorized officer under these regulations, that a right-of-way was validly acquired.

All parties that already have obtained judicial determinations that they hold a right-of-way pursuant to R.S. 2477 must file a copy of the judicial determination with the authorized officer. This will allow the Department to maintain current, accurate records and to manage the right-of-way appropriately. Any issues that are not resolved in the judicial determination, including the scope of a right-of-way, will be determined by the authorized officer under these regulations.

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Section 39.6 Filing Process for Administrative Determination

Paragraph (c) Information Required in the Claim. A claim would be required to include sufficient information to demonstrate to the authorized officer that each element of R.S. 2477 and each requirement of these regulations has been met, and to determine the scope of a claimed or judicially determined right-of-way. By requiring that standard information be provided for all claims and allowing the authorized officer to determine the sufficiency of each point, the Department believes it is establishing a process that will be fair and consistent as well as flexible enough to allow for differences in record-keeping.

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Section 39.7 Effect of Failure to File a Claim

The rule would require claimants to file

claims within 2 years after the effective date of the final rule. The failure to file a claim by that date would be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. Any claims filed after that date would not be accepted or processed. A refusal to process a claim submitted after this date would be final agency action.

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The process in the proposed rule would provide claimants with a reasonable method of obtaining an administrative determination of their claims without undertaking the expense and time of litigation.

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Section 39.8. Processing of the R.S. 2477 Claim

Paragraph (a) Additional Information. This section would set out the procedure that the authorized officer will follow in

processing the claim. The authorized officer will review the information submitted with the claim to determine its sufficiency.

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Failure of a claimant to make reasonable and timely efforts to respond to a request for additional information would be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. The Department's decision not to process an incomplete claim will constitute final agency action.

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Paragraph (f) Review of the Claim. This paragraph directs the authorized officer to review the claim and determine whether the evidence is sufficient to establish that the claimed right-of-way was validity acquired.

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Paragraph (h) Public Notification of Administrative Determination. The authorized officer will publish a notice in a newspaper of general distribution in the vicinity of the claim and in the Federal Register.

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Section 39.9. Appeals Procedure From Administrative Determinations

The proposed regulations allow any interested party, including the claimant, State or local governments, and other public land users to appeal the administrative determination to the Director of the Bureau or Service.

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The decision of the authorized officer will take effect 30 days after its publication in the Federal Register, unless the decision is properly appealed to the

Director during that time.

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The Director may ask the parties or the authorized officer for additional information and may provide for a hearing.

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